IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 4808 OF 2005.

Satyarakash Umeshchandra Pandey. .... Applicant.

Versus.

The State of Maharashtra .... Respondent.

Shri Subhash Jha, with Gaurav Agarwal, Dhrubjeet Ghosh i/by M/s.Law Global for the Applicant.

Shri R.Y.Mirza, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 2nd September, 2005.

P.C.:

1. Heard the learned Counsel for the Applicant and the learned A.P.P. for the State. The Applicant is one of the accused in F.I.R. registered for offences punishable under section 8(A) read with sections 21 and 29 of the Narcotic Drugs Psychotrophic Substances Act, 1985 (hereinafter referred to as "the said Act of 1985"). The application for bail made by the Applicant has been rejected by the learned Special Judge..

2. The case of the prosecution is that on 29th January 2005 at about 10.30 a.m. a P.S.I. attached to Anti-Narcotic Cell received information that the

Applicant along with the co-accused Sharif Mohammed Pathan were coming on the same day in the afternoon near one bus stop adjacent to the public toilet in Bhendi Bazar area, Mumbai for selling brown sugar powder to their customers. Accordingly, a trap was laid and it is alleged that the co-accused Sherif was found possessing 250 grams of brown sugar and the Applicant was possessing 100 grams of brown sugar. A panchanama was recorded.

3. The learned counsel for the Applicant submitted that the commercial quantity of brown sugar is notified as 250 grams. He submitted that even according to the case of the prosecution, the Applicant was found in possession of 100 grams of heroin which is less than a commercial quantity. He, therefore, submitted that as the Applicant was not in possession of the commercial quantity, stringent conditions imposed by section 37 of the said Act of 1985 will not apply to the case of the Applicant. He submitted that the substance found in possession of the Applicant was Diacetylmorphine containing 12.31% of heroin and the contraband in possession of the co-accused was containing 44.30% heroin. The learned Counsel for the Applicant placed reliance on a decision of the learned Single Judge of

this Court reported in 2004 All M.R. (Cri.) pager 3325 (Hiralal s/o.Gauruddin Gore & anr. v/s. State of Maharashtra); a decision of the Division Bench of this Court reported in 2000 All M.R.(Cri.) page 1661 (Sanjeev @ Sanjay Kumar Jadhav & anr. v/s. State). He also pressed into service a decision of the learned Single Judge of this Court in Criminal Application No.4655 of 2005 dated 23rd November 2004. He submitted that only by invoking section 29 of the said Act of 1985, section 37 cannot be held to be applicable. He submitted that there is nothing on record to show that the Applicant is a party to a criminal conspiracy or that he has knowledge about the conspiracy. He submitted that there was no conscious knowledge of conspiracy. He placed reliance on the decision of this Court reported in 2004 All M.R.(Cri.) page 2934 (Rakesh R.Sharma v/s. The Asstt.Commissioner of Customs, Prosecution Cell, Sahar Airport, Mumbai and anr.).

4. The learned A.P.P. submitted that the Applicant and the co-accused were together found in possession 350 grams of brown sugar. He submitted that as they were caught together, primafacie, section 29 of the said Act of 1985 will apply. He submitted that the conspiracy can be established only after evidence is led. He

submitted that no case is made out for grant of bail.

5. I have considered the submissions. It is true that the percentage of heroin found in the contraband seized from the Applicant appears to be different from the percentage of heroin found in the contraband seized from the co-accused. It must be borne in mind that the percentage of the heroin found in the contraband is the potency of the contraband and it has nothing to do with the quantity. The material on record suggests that as per the information received, the Applicant and the co-accused were found together and they were in possession of different quantities of brown sugar powder. Section 29 of the said Act of 1985 has been applied and it is alleged that the Applicant is a part of the conspiracy. Both the accused were found to be in possession of the total quantity exceeding the prescribed commercial quantity.

6. Reliance has been placed on the decision of this Court in the case of Hiralal (supra). It must be noted here that this Court was dealing with an Appeal against the order of conviction and this Court recorded a finding that there was hardly evidence to show that the Appellant before the Court has conspired or hatched a

plan and therefore, it was held that section 29 of the said Act of 1985 cannot be applied. The decision of the Division Bench of this Court in the case of Sanjiv alias Sanjay Kumar will not help the Applicant as this was again a decision rendered in an appeal against the order of conviction. The same is the case with the decision of this Court in Rakesh R.Sharma. In the case of Mohamed Isak Inamullah Khan the learned Single Judge of this Court granted bail on the ground that the charas found with the Applicant before this Court was not of commercial quantity.

7. The material on record shows that the Applicant and the co-accused were found together with different quantity of contraband in their possession. Whether there was a meeting of mind of the accused persons and whether there was conspiracy or there was a plan hatched are the questions to be decided at the time of trial after evidence is recorded. As the position stands today, section 29 of the said Act of 1985 has been applied as the Applicant and the co-accused were together when the contraband articles were found in their custody. The contraband possessed by both of them taken together is more than the commercial quantity. Therefore, stringent conditions laid down by section 37

will certain apply.

8. Considering the fact that the Applicant was found along with the co-accused in possession of the heroin, it is impossible to record a finding that there is no likelihood of the Applicant being convicted even for offence under section 29 and section 8(A) of the said Act of 1985. Hence there is no reason to take a different view from the one taken by the learned Special Judge. The Application is rejected.

Judge.